(a) to negotiate and settle with all the individual purchasers of the said Land and other persons who had caveated the said Land and for this purpose take such Court proceedings as may be necessary, the cost of which is to be borne solely by the Purchasers;

(b) to defend any action brought by any one against the Vendor in matters connected with and arising out of the said Land;

(c) to deal with the State Government on all matters connected with the said Land;

(d) to do such other act or thing as may be necessary for the purpose of completing the sale."

The Official Receiver should have foreseen the likelihood of conflict of interests between the appellant company as the vendor and Jet Age as the purchaser. The matter is more serious when M/s. Suppiah & Singh, the two gentlemen who are partners of the firm of solicitors concerned are also the shareholders of Jet Age.

Under the sale and purchase agreement the problem of getting rid of the encumbrances is the responsibility of Jet Age at whose expense these encumbrances had to be negotiated and settled. We do not see nor comprehend any logic why the Official Receiver should agree to lend the appellant company's name in this firm of solicitors who obviously acted on behalf of Jet Age to take up the proceedings to remove Chatib's and Farland's caveats through successive stages which finally reached us in the present appeals, especially when the appellant company, having received the full purchase price and done what was to be done under the agreement, i.e. giving issue document of title to Jet Age, has no more interest in the land. To show that the Official Receiver is indifferent to these appeals is that no official from this Department was present whilst the appeals were being argued before us. And to show that the present proceedings were in essence carried on at the instance of Jet Age and M/s. Suppiah & Singh is clearly demonstrated by the incident relating to the consent judgment *(supra)* dated September 7, 1983. It is recalled that on that date Mr. Lee Yee Kuang, a Senior Assistant Official Receiver, who appeared on behalf of the Official Receiver – M/s. Suppiah and Singh being absent – agreed to Chatib's and Farland's application to have their caveats extended to a certain date. A consent order was therefore recorded. One would expect that this Consent Order should be honoured and accepted by the Official Receiver on whose behalf this officer had consented to. However, contrary to that expectation on November 2, 1983 M/s. Suppiah and Singh acting in the name of the Official Receiver filed a Summons-in-Chambers to set aside the Consent Order.

It is really sad that the Official Receiver should allow his name to be used in this way as what happened in this case tends to erode public confidence in the competence of his department. It may well be that he could not foresee this situation and the possibility of conflict of interests when he agreed to be bound by clause 6 of the agreement quoted above. We hope that this is an exceptional case.

Appeals dismissed.

Solicitors: *Suppiah & Singh; H. H. Long & Co.*

DAVID HEY v. NEW KOK ANN REALTY SDN. BHD.

[F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F. JJ.) September 4 & October 13, 1984]
[Johore Bahru – Federal Court Civil Appeal No. 7 of 1984]

Company Law – Transfer of shares – Refusal of directors to register transfer – Allegation of unreasonable delay – Need to comply with Guidelines for the Regulation of Assets, Mergers and Take-overs – Companies Act, 1965, ss. 105 & 162.

In this case the appellant had obtained a transfer to himself of 10,000 shares in the respondent company from the First Nominees Pte. Ltd. He applied on June 12 1982 for the registration of the transfer but he received a reply in September 1982 that the Board of Directors of the company had declined to register the transfer. The appellant applied for rectification of the register of members of the company. It was alleged that the Directors in refusing to register the transfer had not exercised their discretion reasonably and in good faith and that in any event their discretion had been lost by unreasonable delay because they took more than 3½ months to send the notice of refusal to him contrary to the requirements of section 105 of the Companies Act. One of the reasons for the delayed refusal alleged by the respondent was because of the need to obtain the approval of the Foreign Investment Committee in accordance with the Guidelines for the Regulation of Assets, Mergers and Take overs.

Held: non-compliance with the requirements of the Guidelines can obviously have adverse consequences especially to a private company such as the respondent company, so that the exercise of the discretion by the directors in refusing to rectify the register was in the circumstances something the learned trial judge rightly declined from interfering with.

Cases referred to:

(1) *Re Swaledale Cleaners Ltd* [1968] 3 All E.R. 619.
(2) *Re Smith & Fawcett Ltd.* [1942] 1 All E.R. 542, 543.
(3) *Ho Kok Cheong Sdn. Bhd. & Anor* v. *Lim Kay Tiong & Ors.* [1979] 2 M.L.J. 224, 226.

FEDERAL COURT.

K. Anantham for the appellant.
J. Cheong for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The appellant had sought by notice of motion an order under section 162 of the Companies Act 1965 to rectify the Register of Members of the respondent company by striking out the name of the First Nominees (Pte.) Ltd., and in lieu thereof to substitute the name of the appellant as holder of 10,000 shares in the company.

The respondent company was incorporated in 1971 under the Act with an authorised capital of $3,000,000 divided into 30,000 shares of $100 each. The appellant obtained by transfer to him 10,000 shares in the respondent company from the First Nominees (Pte.) Ltd. on April 12, 1983.

On June 12, 1982, appellant lodged the transfer together with 11 share certificates for the 10,000 shares to the Company Secretary for the purpose of registration. In reply the respondent company sent a letter dated September 21, 1982, and received by the appellant on September 30, 1982, that the Board of Directors, in exercise of their discretion under Article 32 of the Company's Articles of Association had declined to register the transfer.

The abovementioned Article 32 reads :—

"32. The Directors may in their absolute discretion and without specifying any reason therefor decline to register any transfer of shares whether fully paid or not and whether in favour of an existing Member or not. The Directors may also refuse to register any transfer of shares on which the Company has a lien."

In the Court below and again before us the appellant's stand was that the Directors of the Company in refusing to register the transfer had not exercised their discretion reasonably and in good faith and that in any event their discretion had been lost by unreasonable delay because they took more than 3½ months to send the notice of refusal to him contrary to the requirement of s. 105 of the Companies Act.

The learned Judge held that in the circumstances pertaining to this particular case the directors' discretion had not been lost by the delay in sending the notice of refusal, and dismissed the motion with costs.

Whilst this right to refuse the registering of a transfer without specifying any reason was not disputed, Mr. Anantham for the appellant argues that it is subject to what is provided in s. 105 of the Act and Article 33.

That section reads as follows:

"105. (1) If a company refuses to register a transfer of any shares debentures or other interest in the company it shall, within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal.

(2) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act."

"33. If the Directors refuse to register a transfer of any share, they shall within one month after the date on which the transfer was lodged with the Company send to the transferee notice of the refusal, as required by Section 105 of the Act."

Mr. Anantham submits that the decision in *Re Swaledale Cleaners Ltd.*(1) applies here.

Swaledale Cleaners Ltd., a private company, was incorporated in 1946 with an authorised and issued capital of ten thousand shares of £1 each. The company's articles incorporated, with certain variations Table A of the Companies Act, 1929. Article 8 provided that the directors might refuse to register any transfer of shares and that cl. 19 of Table A should be modified accordingly. Clause 19 contained the following provision which was not altered by the articles; "If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal." A corresponding provision was re-enacted in s. 78(1) of the Companies Act, 1948. By Clause 82 of Table A, the quorum necessary for the transaction of the business of the directors was two, and cl. 83 provided that the continuing directors might act for the purpose of increasing the number of directors to obtain a quorum, or of summoning a general

meeting of the company, but for no other purpose. On August 3, 1967, the shares of the company stood as to four thousand shares in the name of S, and as to five hundred shares in the name of the applicant; the rest of the shares in the names of two deceased persons, as to five thousand in one name and as to five hundred in the other. Two transfers of the shares of the deceased persons had been executed in favour of the applicant. S. and the applicant were the only directors of the company and on August 3, 1967, they held a combined directors' and annual general meeting. The applicant retired by rotation from being a director and was not re-appointed; but his appointment as acting secretary was confirmed. The transfers of shares were produced and registration of them was refused. No step was taken by S. to appoint an additional director after the number fell below two until December 18, 1967. The applicant filed a notice of motion on December 11, 1967 (i.e., four months later) asking for an order pursuant to section 116 of the Act of 1948 that the register of members of the company be rectified by inserting the applicant's name as the owner of the deceased's shares. On December 18, 1967, S. appointed an additional director; the directors subsequently refused to register the transfers.

In confirming the decision of the Court below the Court of Appeal held that rectification of the register by registering the applicant as transferee of the deceased's shares would be ordered, because the powers conferred by the articles of association on the directors to refuse to register the transfer must be exercised within a reasonable time and, a reasonable time having expired before the purported refusal, the right of refusal had been lost.

We have taken special note of what Harman, L.J. said (at page 622) – "other things being equal, a reasonable time within which directors must make up their minds either to accept a transfer or to refuse it must be the two months within which they have to make an answer under s. 78(1) of the Companies Act, 1948" (which is in similar terms to our s. 105(1)).

That two directors in the present appeal had resigned at the end of May 1982 did not matter, says Mr. Anantham because Article 119 provides that the quorum necessary for the transaction of the business of the Directors, unless otherwise fixed by the Directors, shall be two. It was never disputed by the respondent company that a quorum was available despite the resignations.

All that Phillip Yeo said about the matter in his affidavit was that he was told not to call any meeting of the Board of Directors until so instructed by the new directors, three of whom were appointed some two months later.

Two other reasons were advanced in Mr. Phillip Yeo's affidavit in reply for the delayed refusal to register. First in May 1979 the Johore Bahru Police had seized the Share Register, Minute Books and other documents of the company in consequence of which it was not able to verify from the Share Register whether the share certificates submitted by the appellant together with the transfer forms had in fact been issued by the company to the transferor, which was the normal practice.

Secondly the 10,000 shares involved represented 37.04% of the total issued capital of the company, says the affidavit. The prior approval of the Foreign Investment Committee of the Govt. of Malaysia is required where there is any acquisition of 15% or more of the voting rights of any Malaysian company, whether by Malaysians or non-Malaysians. It is not disputed that the appellant had not obtained such approval.

Miss Cheong maintains that this is one of those occasions where this Court should not interfere with the exercise of discretion by the learned trial judge for that discretion had been properly exercised. We were referred to the well known authorities by which we should be guided in considering an appeal of this nature. They appear on pages 919 and 920 of the *Supreme Court Practice 1982.*

In addition, she submits that S. 105 of the Companies Act only makes it an offence if there is a late refusal to register, for which the penalty is a fine.

Whilst conceding that it is true that following the case of *Re Swaledale Cleaners Ltd.* other things being equal, the right to exercise the right to refuse should be exercised with reasonable promptitude which under our Act should be within one month it was urged upon us that the qualification underlined, in other words the special circumstances pertaining make this time limit inapplicable.

In addition she referred us to the words of Lord Greene, M.R. in *Re Smith & Fawcett*

Ltd.[2] regarding the principles to be applied by directors in the exercise of the discretion when accepting the transfer of shares: "They must exercise their discretion *bona fide* in what they consider – *not what a court may consider* – (the emphasis is ours) to be the interests of the company, and not for any collateral purposes." and again to another passage of the same judgment at page 545 – "Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inference as to the *bona fides* or *mala fides* of the actors. In the present case the principal director has sworn an affidavit which, if accepted, makes it clear that, whether rightly or wrongly, the directors have *bona fide* considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares."

In other words learned counsel for respondent is saying that even if the learned trial judge and indeed this Court consider that the absence of approval for this transfer of shares by the Foreign Investment Committee is not contrary to the interest of the respondent company, the fact that the directors had such *bona fide* belief that the absence of approval would have that effect is ground enough for refusal to register. The exercise of this discretion the courts should not override.

The counter argument raised on behalf of the appellant was that non-approval by the Foreign Investment Committee is a political decision which does not affect the legal position as regard this transfer of shares. The authority for this proposition is the decision of Wan Hamzah J. in *Ho Kok Cheong Sdn. Bhd. & Anor.* v. *Lim Kay Tiong & Ors.*[3]

There the facts are quite different. The plaintiffs, in the High Court, had caused a specially endorsed writ to be served on the defendants claiming against the first defendant for an order of specific performance of an agreement whereby the first defendant agreed to buy from the plaintiffs 557,779 shares in the Perforated Plates Sdn. Bhd. for $780,890.00 of which 10% had been paid as a deposit, and claimed against second defendant (as guarantor) for the balance of the purchase price which had not been paid with interest. The plaintiffs applied for judgment contending that there were no triable issues.

One of the grounds advanced by the defendant in opposing the application was that the Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs issued by Government in 1974 apply to the agreement and since the requirements of the Guidelines had not been complied with, the agreement was void and unenforceable as being in contravention of public policy. The learned judge found that the agreement did not fall within the list of transactions or proposals listed in the "Guidelines" therefore what he said thereafter (at page 226) is *obiter*. We have nevertheless set it out hereunder:

> "The guidelines require that any of the above proposals should be submitted to the Foreign Investment Committee, Economic Planning Unit, Prime Minister's Department. It was submitted on behalf of the defendants that the guidelines apply to the agreement and the requirement of the guidelines have not been complied, and therefore the agreement is void and unenforceable as being in contravention of public policy, or alternatively the contravention renders the agreement illegal and unenforceable, or the non-compliance renders the agreement voidable at the option of the first defendant and the option has yet to be referred to or exercised by the first defendant. In my opinion the agreement is not a proposal of the kinds enumerated in the above list of proposals. The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law but are of advisory character merely. I do not think that non-compliance with the guidelines can be taken as an act opposed to public policy. The guidelines reflect the Government's political policy, but Government's political policy is not public policy."

It is not necessary in deciding this appeal for us to decide whether the "Guidelines" is public policy for there had been not even a suggestion that the agreement to transfer the shares was void and unenforceable because it lacked approval of the Foreign Investment Committee. Indeed beyond a mere reference to the passage above cited by counsel, neither counsel deigned to elaborate upon this issue.

What is clear is that the directors took into account the absence of such approval in this transfer of shares in exercising their discretion.

We have studied the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs", a document which was referred to by the learned trial judge in his notes of proceedings. It would seem to us that it is more than mere political policy, reflecting as it does a national economic policy, the New Economic Policy of which we could properly take judicial notice. Non-compliance with the requirements of the "Guidelines" can obviously have adverse conse-

quences especially to a private company such as the respondent company, so that the exercise of the discretion by its directors in refusing to rectify the register is we think, in the circumstances something the learned trial judge rightly declined from interfering with.

The appeal is accordingly dismissed with costs here and below.

Appeal dismissed.

Solicitors: *Skrine & Co.; Mah-Kok & Din.*

TELEVISION BROADCASTS & ORS. v. SEREMBAN VIDEO CENTRE SDN. BHD.

[O.C.J. (Peh Swee Chin J.) September 12, 1983]

[Seremban – Civil Suit No. 170 of 1983]

Practice and Procedure – Application to set aside interim injunction – Anton Piller Order – Alleged infringement of copyright – Damages not an adequate remedy.

Copyright – Cinematograph films – Whether foreign company can acquire copyright in Malaysia – Whether general manager of company can apply for order that copyright has been infringed – Whether non-exclusive licensee can sue for breach of copyright – Copyright Act, 1969, ss. 6(1)(a), 12A(2) & 14(3)

In this case the plaintiffs had obtained an interim injunction by which the defendant was restrained from committing various acts of infringing the copyright in respect of cinematograph films. The order incorporated directions of the *Anton Piller* type authorising the plaintiff to enter the premises of the defendant for the purpose of removing infringing materials and inspecting and photographing instruments and materials. The defendant applied to set aside the interim injunction on the following grounds –

(a) that the damage in this case was not irreparable and the injunction ought to be set aside;

(b) that the affidavit sworn by the general manager of the third plaintiff was improper in view of section 12A(2) of the Copyright Act which requires the affidavit to be made by a responsible officer of the Company;

(c) that as the 1st and 2nd plaintiffs were foreign companies they could not acquire any copyright in Malaysia unless there was an executive order to extend the application of the Act to such foreign companies or citizens of a foreign country as a result of some international treaty signed for that purpose.

(d) that the 3rd plaintiff was a bare licensee and could not therefore sue in his own name.

Held, dismissing the application: (1) the applicant for an injunction must show that damages would not be an adequate remedy and one of the ways of establishing this is to show that the damage is irreparable when for example the act complained of is likely to destroy the subject matter in question. In this case publication of the cinematograph films in the form of video cassettes could be regarded as such destruction of the copyright and therefore the plaintiffs had shown that the damage was irreparable;

(2) the provisions of section 12(A)(2) of the Copyright Act, 1969 are merely directory and not mandatory. The defendant need not be a salaried or high ranking employee of the first or second plaintiff to be such a responsible officer. Such a responsible officer would include an attorney acting under a power of attorney or other person duly authorised by the company or body of persons;

(3) section 6 of the Copyright Act 1969, enabled a foreigner to acquire copyright in Malaysia;

(4) a non-exclusive licensee can sue in his own name if he joins the copyright proprietor.

Cases referred to:–

(1) *Lee Yee Seng & Ors.* v. *Golden Star Video Bhd.* [1981] 2 M.L.J. 43.

(2) *Television Broadcasts Ltd* v. *Mandarin Video Holdings Sdn. Bhd.* [1983] 2 M.L.J. 346.

(3) *Young & Anor.* v. *Odean Music House Pty. Ltd. & Anor.* (1976) 10 A.L.R. 153, 161.

NOTICE OF MOTION.

Lee Lim Huat for the applicant/defendant.
Dato V.L. Kandan for the plaintiffs/respondents.

Cur. Adv. Vult.

Peh Swee Chin J.: By a notice of motion dated May 16, 1983, the defendant applied to set aside an interim injunction granted by the Court on May 7, 1983. By summons-in-chambers dated May 7, 1983, the plaintiffs applied for the same order to be continued until the trial of this action. Both the notice and summons were heard together. After the hearing, the motion was dismissed; an order in terms of the summons except its prayer 3, was made on the summons and in both cases I further ordered costs in the cause. The defendant has now appealed.

Under the terms of the order made on May 7, 1983, the defendant is restrained, in substance, from committing various acts of infringing the copyright in respect of cinematograph films described therein. This order incorporates directions of the *Anton Piller* type, authorising the plaintiffs, in effect, and *inter alia,* to enter the premises of the defendant, for the purpose of removing infringing materials; inspecting and photographing infringing instruments and materials etc.